United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

545

No. 22,103

SANDRA R. JOHNSON,
Individually and on behalf of her minor child
DARE ELIZABETH JOHNSON,

Appellants,

v.

W. L. MASSEY,
Deputy Commissioner, United States Department of Labor,
Bureau of Employee's Compensation, District of Columbia
Compensation District,

Appellee,

and

CONTINENTAL CASUALTY COMPANY,

Intervenor and Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX

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Washington, D. C. - THIEL PRESS - 202 - 393-0625

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CIVIL DOCKET

United States District Court for the District of Columbia

PARTIES	NUMBER
	1753-67
SANDRA R. JOHNSON, Individually	
and on behalf of her minor child	ACTION FOR
DARE ELIZABETH JOHNSON	TO SET ASIDE COMPENSATION
	ORDER
vs.	(Longshoreman's Act)
	TAXED COSTS
W. L. MASSEY,	Atty.
Deputy Commissioner, United States	Marshal
Department of Labor	Clerk
	Witnesses
CONTINENTAL CASUALTY COMPANY	Depositions
Defendant Intervenor	Examiner
	Ct. Appls.

DATE		PROCEEDINGS
1967		Deposit for cost by
July	10	Complaint, appearance ; Exhibit "A" filed
July	10	Summons, copies (3) and copies (3) of Complaint issued Atty Gen ser. 8-3 ser. 7-14; US Atty ser. 7-16
Sep	14	Answer of deft to complaint; c/m 9-14-67; appearance of David G. Bress and Ellen Lee Park. filed
Sep	14	Calendared (N) AC/N
Oct	18	Motion of Continental Casualty Company to intervene; notice; P&A; c/m 10-18; M.C.; appearance of Galiher, Stewart & Clarke; deposit by Galiher $5.00. filed
Nov	15	Order granting motion of Continental Casualty Company to intervene as party deft. (N) AC/N 9-14-67. Micro 11-16-67 McGuire, J.
Dec	28	Answer of intervening deft. to complaint; c/m 12-26-67; appearance of Galiher, Stewart and Clarke, William J. Donnelly, Jr. filed
1968 Feb	8	Motion of deft. #1 for summary judgment; P&A; c/mailing; exhibit A; M.C. filed
Feb	13	Stipulation extending to 3-29-68 time for pltfs. to oppose deft's motion for summary judgment. filed
Mar	12	Opposition of pltf. to deft's motion for summary judgment; cross-motion for summary judgment; c/m 3-11; P&A; M.C. filed

Mar	27	Called Pretrial Examiner
Apr	22	Order granting motion of deft. for summary judgment and dismissing cause with prejudice. (N) AC/N Hart, J.
Jun	10	Notice of appeal by pltfs; copies mailed to Ellen Lee Park, Asst. U. Attorney, and Galiher, Stewart & Clarke; deposit by Friedman $5.00. filed

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[Caption Omitted in Printing]

FILED

JUL 10 1967

COMPLAINT

(Action to Set Aside Compensation Order Rejecting Claims for Death Benefit)

1. Jurisdiction of the Court is based upon Title 33 U. S. Code, Sec. 921 and Title 36, Sec. 501 D.C. Code, 1961 edition.

2. The Plaintiff, Sandra R. Johnson, a citizen of the United States, the surviving widow of Robert J. D. Johnson and brings this suit in her own right and on behalf of Dare Elizabeth Johnson, minor child of the Plaintiff and the deceased Robert J. D. Johnson.

3. Defendant is a duly appointed Deputy Commissioner for the District of Columbia Compensation District under the said Longshoreman's and Harbor Workers Compensation Act and is sued in his official capacity.

4. On July 2, 1965, the employee Robert J. D. Johnson, while driving hime in an automobile owned and furnished him by his employer Jopra, Inc., was killed in a head-on collision in Rock Creek Park and was dead upon arrival at the Washington Hospital Center on July 2, 1965 at approximately 3 a.m. At the time of the accident, the employee was driving

an automobile owned by his employer and furnished to him for use on emergency calls to which he was subject at all hours of the night and in driving to and from his home to his business and from his place of business to other business appointments. His working hours required him to work until approximately 2 a. m. and to drive the employer's car late at night at which time the danger of an accident is more prevalent. On the date of the accident, he had attended a business meeting with other stockholders of his employer and after the meeting, after visiting another location in which he and other stockholders of employer had an interest, while driving his employer's car on a direct route to his home, he collided with another car and was fatally injured.

5. Thereafter, on October 14, 1966, Plaintiff filed a claim for death benefits as surviving widow on behalf of herself and her minor daughter under the Act of Congress approved May 17, 1928, entitled "An Act to Provide Compensation for Disability or Death resulting from injury to employees in certain employment in the District of Columbia and for other purposes." Title 36, Section 501, 1961 Ed. D.C. Code, alleging that the death of her husband, the employee, arose out of and in the course of his employment by the said employer, Jopra, Inc. Thereafter a hearing was held before the Defendant and on June 27, 1967 Defendant issued a Compensation Order rejecting the claim for death benefits for the reasons stated therein. Copy of said Compensation Order is attached hereto and made a part hereof, marked Exhibit A.

6. Said Compensation Order, including the findings of fact contained therein, is not supported by and is contrary to the record which clearly

establishes that the death of the employee arose out of and in the course of his employment; the record contains no substance evidence to support the Compensation Order.

WHEREFORE Plaintiff prays:

1. That process issue against the Defendant.

2. That the defendant be required to file with this Court the transcript of the testimony taken at the hearing of this matter together with all exhibits and materials which compose the official record before the Bureau of Employee's Compensation.

3. That upon final hearing a judgment be entered setting aside or annulling the Order of the Deputy Commissioner mailed June 27, 1967 and awarding plaintiff lawful compensation.

4. That this Court grant such further and other relief as to it seems just and proper.

[Subscription Omitted in Printing]

FILED

SEP 14 1967

ANSWER OF DEFENDANT DEPUTY COMMISSIONER

Defendant William L. Massey, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs numbered 1, 2, 3, and 5.

2. Denies the allegations contained in paragraph numbered 6.

3. Neither admits nor denies the allegations contained in paragraph numbered 4 but, instead, for answer refers the Court to the

evidence in the record of the proceedings before the deputy commissioner which contains all the facts in the case here under review.

4. For a further defense, defendant deputy commissioner alleges that the compensation order complained of is in all respects in accordance with law.

WHEREFORE, defendant deputy commissioner prays that the complaint be dismissed.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

8

JOSEPH R. NAVALANEY

* * *

THE WITNESS: Joseph R. Navalaney. I am assigned to the 5th Precinct, Metropolitan Police Department.

DIRECT EXAMINATION

BY MR. FRIEDMAN

Q Officer, are you here in response to a subpena?

A Well, I am representing the Metropolitan Police Department.

Q And did you bring with you the business file card of The Rotunda?

A Yes, sir.

Q Do you have it with you?

A Yes (handing to counsel).

MR. FRIEDMAN: I offer this card in evidence as

9 Claimant's Exhibit--

* * *

BY MR. FRIEDMAN:

Q What is the use to which this card is put by the Police Department?

A In case of emergency or anything happens in a business establishment we notify the people.

Q The people named on the card are notified in case of an emergency?

10 A That is correct.

* * *

JOSEPH DOBAL

* * *

THE WITNESS: My name is Joseph Dobal. My address is 5905 Grovener Lane, Bethesda, Maryland.

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q What is your business, Mr. Dobal?

A Manufacturer's representative.

Q And where is your office?

A 1625 Eye Street, Northwest.

Q In connection with your business, is it necessary for you to do a substantial amount of entertaining?

* * *

12 Q At approximately what hour?

A Approximately at a quarter to 11; between 10:30 and 11.

* * *

A Right.

Q And Hank or Henry Prati?

A Yes, and Mrs. Prati, the boys' mother and Armando Prati's wife, Anita.

Q Did you have occasion to talk to Mr. Johnson on this party when you joined them at their table?

A Yes.

Q How long did you stay at Aldo's Restaurant?

A A little over an hour.

Q Uh-huh. When you left Aldo's did you leave by yourself?

A My own group.

Q All right. And did you meet up with Mr. Johnson?

A Yes.

Q Where?

A In the parking lot.

* * *

13 Q Uh-huh. Did you have a conversation with him?

A Yes.

Q What was the nature of the conversation?

A One of the fellows I was with that evening said he would drive me to my car, and Mr. Johnson said he would drive me to my car inasmuch as the Pratis were going the other way

and it would be easier for him to take me to my car.

Q And I assume you then left with Mr. Johnson?

A Yes.

Q Now, did you have any conversation with Mr. Johnson relating to where he was going before he would take you to your place?

A Yes, he said he had to make two stops, to see Mr. English at the Black Sheep Restaurant and stop at the Channel House.

Q Did he tell you why he wanted to stop at the Channel House?

A He said he wanted to check things there.

* * *

14 Q How long did you stay at the Black Sheep Restaurant?

A Approximately an hour.

Q Then, where did you and Mr. Johnson go?

A Channel House.

Q In whose car did you go?

A In his.

Q The same kind of car?

A Yes.

Q Where is the Channel House located?

A New Hampshire Avenue and approximately the 800 block.

Q Who drove the car to the Channel House?

A Mr. Johnson.

Q When you got to the Channel House, did Mr. Johnson park his car or did the doorman park it for him?

A The doorman.

Q And then did you go into the Channel House?

* * *

15 Q About what time was it when you arrived at the Channel House?

A Roughly, between 1:30 and 2:00 o'clock.

Q How long did you stay there?

A Perhaps 45 minutes to an hour.

* * *

Q And did you and Mr. Johnson leave in the car?

16 A Yes.

Q And who drove?

A Mr. Johnson.

Q Do you know where Mr. Johnson lived?

A Yes.

Q And at that time, July of 1965, did Mr. Johnson take as he left the Restaurant?

A It was very confusing in that area with new construaction work going on, but we generally headed toward Rock Creek Park.

Q You drove up through Rock Creek Park?

A Yes.

Q Did he tell you why he was driving up through Rock Creek Park?

A Yes. He thought he would drop himself off and let me take the car.

Q Drop himself off, where?

A At his home.

Q In other words, in that car?

A Yes.

Q He was going to drive to his home and then give you the car to drive to your home?

A Yes

Q Do you know where the accident occurred?

A In Rock Creek Park, I think it is just before you get to Mass. Avenue is the only way I can qualify it.

Q Would you say that was a direct route to his home?

A Yes.

Q How far from his home was the place of the accident?

A Just a few minutes.

* * *

CROSS-EXAMINATION

BY MR. DONNELLY:

Q Incidentally, were you a friend of Mr. Johnson?

A Yes.

Q About how long had you known Mr. Johnson?

A About ten years.

21 Q Were you a close friend of his?

A I judge that I was.

* * *

Q Now, after you left the Black Sheep, where did you go, sir?

* * *

22 Q Did you know that Mr. Johnson --or were you aware that he was one of the owners of the Channel House?

A Yes.

MR. DONNELLY: All right.

Q What did you do in the Channel House?

A He wanted to check on things, as he put it, and we went in there and he had his duties to do, whatever he was going to do; and I talked to a couple of people, and then the bar tender.

Q And I take it he had some business at the Channel House, which he owned?

A He so indicated.

Q Now, after completing his business in the Channel House Restaurant, you left; and what time was that?

A We were in there when it closed. It was after two.

* * *

25 SANDRA R. JOHNSON

* * *

THE WITNESS: Mrs. Robert J.D. Johnson, 3108 Garfield Street, Northwest, Washington, D.C.

THE DEPUTY COMMISSIONER: All right, Mr. Friedman.

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q You are the cliimant in these proceedings on behalf of yourself and daughter Dare Elizabeth Johnson?

A I am.

Q Now, your claim for compensation states that the time of your husband's death was July 2, 1965: Was he in the employ of Jopra, Inc.?

A Yes.

Q What was the business of Jopra, Inc.?

A They were in the restaurant business.

Q And where was the restaurant located?

26 A 30 Ivy Street, Southeast.

Q And what was it called?

A The Rotunda.

Q Were you a frequent visitor at the office of the Corporation?

A I was.

Q And the Restaurant?

A Yes, both.

Q Where were the offices located?

A Right in front of the Rotunda Restaurant.

Q Well, in a separate building?

A Yes, in a separate building.

Q Known as 30 Ivy Street?

A Yes.

Q And The Rotunda was in a separate building in the rear of the office?

A Yes.

Q How often did you frequent the Restaurant?

A I was down at The Rotunda about four nights a week.

Q Did you also go there for lunch?

A Yes. It was one of the few occasions when the baby would see her father, when I brought her for lunch. So we tried to get there once every ten days or two weeks.

Q Did you take the baby along with you?

A Yes.

27 Q Now, during the time that you visited the Restaurant, did you visit the offices?

A Yes, I did. I had to pick Bob up several times at the office.

Q Did you observe your husband while he was at work in the Restaurant and in the office?

A Yes, both places.

Q From your own knowledge, what did you observe your husband doing in the office and in the Restaurant?

A In the office, I had seen my husband instructing the bookkeeper as to setting up ledgers and ordering stationery. They were trying to set up a Credit Card system.

He was very much involved in that --and just the normal duties any employer has had with people who handle accounting.

Q What title did your husband have?

A Secretary.

Q Who were the other officers?

A Ermanno Prati and Henry Prati.

Q And what were their titles?

A I think that Hank was the President and Al was the Vice-President.

Q And how much stock did your husband own?

A Fifty per cent.

Q Who owned the rest of it?

28 A I believe the three, Hank and Al.

Q And who was on the Board of Directors, if you know?

A I believe the three, Hank, Al and my husband.

Q Now, did you observe what work your husband did in the Restaurant?

A I did.

Q And what did you see him doing in the Restaurant?

A From my own knowledge I have seen him greetpeople at the door; physically set up tables, especially if there were large parties.

Well, I had to wait for him at night until he went to a conference that they called "Checking Out", where he

would stay up with the bar tender after all the customers had left until two and three in the morning and compare the tape with the cash register with the bills that the waiters would bring.

Q Did he also do that with the chef?

A He talked with the chef every evening and had a count every day of how many luncheons were servedand how many dinners were served, compared the bills with the tape, that the waiters turned in at the end of the day.

Q Now, how would you characterize your husband's employment in this?

A As a working partner.

Q In addition to his being Secretary, did he per-
29 form all these other duties that you have referred to?

A He did.

Now, my husband, from my own personal knowledge, things I saw Bob do, I saw him talking to Mr. Batista, who was the manager of the Restaurant, I have seen Bob order food and order liquor. We have even gone down there Sundays to make sure the place was locked up tight.

There were many times when my husband was called at three and four o'clock in the morning to go down to The Rotunda. They had several cars stolen. He had to get up in the middle of the night and go down and make sure that everything was all right.

MR. FRIEDMAN: I get it clear now.

Q Did your husband have an office at his home?

A Yes.

Q And was that a separate room?

A Yes, on the second floor.

Q And did he have a desk in it?

A Yes; a desk, telephone, file cabinets.

Q Now, was any business of Jopra conducted at the home office?

A Yes.

Q Who furnished your husband with the automobile in which he was killed?

A The Corporation.

30 Q Who paid for the car; its upkeep?

A The Corporation.

Q Did the other officers and directors of the Corporation know the use to which your husband put the car?

A Yes, because they were passengers in the automobile many times.

Q Did your husband use the car in going to The Rotunda and back again to his home?

A Yes: also, on related business.

I have seen him take the car to the bank when he had to appear in front of lumber committees; that type of thing.

Q Did he use the car when he had business with the District of Columbia officials?

A Yes, he did, when they were trying to get a new entrance for The Rotunda, over a curb. I believe it was on D Street. I am not sure of my location. But the Citizens' Association on Capitol Hill did not want to allow him another egress into the Restaurant.

And this was part of my husband's assignment, trying to do this.

Q And that required him to use the car in going to the District?

A Yes. And also they were trying to get Ivy Street made a two-way instead of a one-way street, which was another
31 assignment that he had, trying to get this straightened out, for which he had to go back and forth, to the District.

Q When he had to go back and forth to the District, did he use this automobile?

A Yes, he did.

Q For how long has Jopra, Inc. supplied the use of a car for various purposes?

A From the inception of the Corporation.

Q And when was that?

A In 1962. It opened in June of '63.

Q So Jopra had supplied him with a car for this use for approximately three years?

A Yes.

Q Prior to his death?

A Yes.

Q What hours did your husband usually spend in the Restaurant?

A He left the house at or about ten o'clock in the morning.

Q When he left, how did he go?

A In the Company car.

Q The company car.

All right.

A And then he would go to the Restaurant and perform what he called "his daily rounds". He talked to the chef, he talked to his partners; had lunch down at the restaurant--

Q When you refer to his "partners," The Rotunda was a corporation--

A Right.

Q And your husband was not a partner--

A No.

Q He was a stockholder?

A That's right. It was just a manner of speaking.

Q So when you refer to him as a "partner" you mean a stockholder.

Now, who were the other stockholders?

A Hank and Al Prati.

Q And then you say he had lunch--

A Normally, he had his lunch down teere. In the afternoons they conducted whatever business had to be conducted.

He tried to get home in the afternoon to see the baby.

Q And when he went home, he would use the car to go home?

A He did. And he would leave again between six and seven.

Q What transportation did he use?

A He used the Company car.

Excuse me. And then he would return to The Rotunda again and have his dinner, and they had their business meet-
33 ings, and he would check out, and return home between 2:30 and 3:00 in the morning.

Q And he returned home in the same car?

A The Company car.

Q Where was the car kept at night?

A Either in front of our home or in the rear of our home.

Q Do you know the place where your husband was killed?

A I do.

Q How far was that from your residence?

A Merely walking distance. It's about 4 minutes by automobile.

Q Was that on a direct route to your home?

A It is the way we always came home.

Q Now, just to repeat a little bit:In what respect did your husband's employer's business require the use of the Company's car?

A In every respect--to get to and from The Rotunda in an automobile; and I might say there were many occasions when he went to the Airport to pick people up who might go to The Rotunda, and several people, I think the man that designed The Rotunda who lived at Fort Laudersale, and Bob would bring him up from the Airport to our home to spend a time at the house.

35 A No.

* * *

CROSS-EXAMINATION

BY MR. DONNELLY:

A How many cars do you and Mr. Johnson have?

A None.

Q The only car you had was for family use, for use at home, was the Cadillac?

Is that right?

A I didn't use the car. I drove infrequently.

Q The question is, how many cars did you have?

A None.

Q Prior to the time of your husband's death, there was a car available at home?

In other words, how many cars were there, one or two or--

A I don't understand the question. The car was my husband's business car. It wasn't our car.

Q I understand that, ma'am. The question is, did he have a business car?

A Yes.

Q There was only one car available to him, then, and that was the car in the name of Jopra?

A Right.

Q And it was a 1965 Cadillac?

* * *

36 MR. DONNELLY: ALL right.

Q Now, let's take one at a time.

The Channel House was another corporation?

A Yes.

Qq He was an officer and stockholder in the Channel House.

Is that correct?

A He had a third interest in it.

Q A third interest in the Channel House?

* * *

37 MR. DONNELLY: All right.

Q Now, also he had an interest in the Linden Hill.

Is that correct?

A Yes.

Q And Linden Hill is another restaurant located in Maryland in a large apartment building alongside the Beltway?

A Correct.

Q What interest did he have in that?

A /third.

Q And that was a corporation?

A Yes.

Q Now, what other interests did he have?

A The Viking and Linden Hill and Tyjon corporations.

Q Now, he had an interest in Jopra, Channel House and in The Linden Hill, which is called the Tyjon Corporation?

A Yes.

Q Did he have an interest in any other restaurants?

A No.

MR. DONNELLY: All right.

Q Now, in addition to his restaurant business, he was also interested in the Drive-In business?

38 A Yes.

* * *

BY MR. DONNELLY:

Q Didn't he have a Drive-In down in Richmond, Virginia?

A Yes. He had a Drive-In with a manager in Petersburg, full-time also and the same in Richmond.

Q How many Drive-Ins did he have?

A Two.

Q That is, a Drive-In Theater?

A Yes.

* * *

Q This Drive-In business: these were corporations weren't they?

A Yes.

* * *

39 Q Now, where was his office for the --Where did he maintain, what offices did he maintain?

A The one at Jopra.

MR. DONNELLY: All right.

Q And at the Jopra office, he had his office there for the management of the Channel House, didn't he?

A Oh, they were channeled into the same thing.

Q That's what I mean. The Channel House business, books and so forth, and the operation of it, was from the Jopra office?

A Yes.

* * *

40 Q Now, he did use this car in connection with the Linden Hill and the building business, did he not?

A He did.

* * *

41 Q Suppose he wanted to play golf on Sunday?

A He would use the Company car unless some one picked him up.

* * *

Q But to repeat: There was only one car available to him and this was a Cadillac and the title was in the name of Jopra, Inc, whether it was used for all purposes--

A It was the only car available to my husband.

* * *

42 A Yes. That was Mr. Orsini.

Q And your husband managed the business from his office at Ivy Street, didn't he?

A He managed from the Rotunda itself, inside the Restaurant.

Q While he was at Ivy Street he also managed the Channel House and what interests he had at Linden Hill?

A That is a hard question to answer. My husband's primary interest as The Rotunda, I would say.

Q Now, there were employees at Ivy Street' isn't that correct?

A That is correct, in the office.

Q And these employees, shall we say, were serving the interests of the Prati's in connection with these businesses.

3 Isn't that right?

A They took care of the books for the Restaurant.

Q How many employees were there at the time?

A I would say six or seven. They would come and go.

* * *

44 REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q The office at 30 Ivy Street was the office of all the restaurant corporations, was it not?

A It was.

Q And your husband was not the owner of any of those restaurants?

A No.

Q Each one is a separate corporation?

A Yes.

Q And your husband was a stockholder in each one of of these to the extent you have stated?

A Yes.

Q Were those businesses interrelated in any way -- to the extent of buying supplies?

A Yes. They could get a better price if they dealt with the one person for the two restaurants.

Q And the employees at 30 Ivy Street took care of the affairs of all the restaurants, did they not?

A Yes.

45 Q Now, reference was made to a piece of property that was in the name of the restaurants, was it not?

The Hiram Johnson Corporation.

A Yes.

Q Now, were the Pratis also interested in Linden Hill?

A Yes, they were.

Q And the Channel House?

A Yes, sir.

MR. FRIEDMAN: That is all.

RECROSS-EXAMINATION

BY MR. DONNELLY:

Q Your husband was part-owner in these businesses with the Pratis?

A He was a stockholder in the corporations.

Q He was part-owner and partner in them?

A It's a matter of semantics.

Q That's exactly my point.

A I mean, my husband owned a third interest in the Channel House, 50 per cent of The Rotunda and 30 per cent of the Linden Hill.

* * *

46 REREDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mrs. Johnson, no matter what Mr. Donnelly may have said, Your husband was not the majority of the Board of Directors of any one of these restaurants, was he?

A He was not.

Q And he was not a majority stockholder in any one of these restaurants, was he?

A He was not.

Q And he was subject to the rules and regulations of each one of these Corporations' by-laws, was he not?

A He was.

MR. FRIEDMAN: That is all.

THE DEPUTY COMMISSIONER: Tell me a little more about his activities during the day, the normal hours
47 he kept?

THE WITNESS: He left the house about ten in the morning, and he met with Hank and Al Prati and they would go over whatever business had to be conducted.

Bob was involved down there in several things in connection with the restaurant. They were trying to secure the air rights to the Railroad. My husband had a dream of building a hotel at The Rotunda on the first floor, and this is one of the things he was vitally interested in doing.

Now, they had a running battle with the District Government about an egress, trying to get them to lay the curb line. The Citizens' Commitee said they would put up so many bushes, trees and flowers to make the entrance to their specifications, if they would allow egress to the Restaurant, which they did not do; also trying to get the gasoline station on the corner to do something which would add to the appearance of the Restaurant.

THE DEPUTY COMMISSIONER: To The Rotunda?

THE WITNESS: Yes.

And I came down with the baby because she did not have much chance to see her Dad.

Now, he came home about 4:00 in the afternoon, and we would talk about the things that I had done and things that he had done, and he would go down to the Restaurant and I would go with him. My mother would come over and stay with
48 the baby, and later on I got a woman in, and Bob would return about 2:30 or 3 in the morning.

Now, this was the normal working day for him.

MR. FRIEDMAN (Interposing): And the other business he conducted with regard to the other Corporations was also done from the office building in front of The Rotunda?

THE WITNESS: Yes; all of the bookkeeping was done there.

MR. FRIEDMAN: Everything was done there?

THE WITNESS: Yes.

THE DEPUTY COMMISSIONER: Did he visit the other restaurants during the day?

THE WITNESS: My husband's main business was The Rotunda. Al-Prati spent most of his time at the Channel House and Hank Prati at Aldo's because his mother was instrumental in obtaining a loan to open the Rotunda. They were a very close Italian family, and Mrs. Prati was going to expand. They sold the property and were going to open

up a new apartment or a restaurant in the basement, which hadn't been built yet. But there was a close family relationship there, and Hank normally dropped in down at Aldo's.

That is how it worked out.

THE DEPUTY COMMISSIONER: And this automobile was registered in the name of the Corporation?

THE WITNESS: It was.

49 THE DEPUTY COMMISSIONER: Jopra, Inc.?

THE WITNESS: Yes.

* * *

ERMANNO PRATI

* * *

THE DEPUTY COMMISSIONER: Please give your name and address to the reporter.

THE WITNESS: Ermanno Prati, 2154 Wyoming Avenue, Northwest, Washington, D.C.

* * *

50 BY MR. FRIEDMAN:

Q Mr. Prati, who were the directors of Jopra, Inc. on July 1?

A Henry Prati, Robert J.D. Johnson and myself.

Q And Henry Prati was, what?

A President.

Q And you were, what?

A Vice-President.

* * *

53 (The document was then marked as Claimant's Exhibit "B"for identification and received into evidence.)

BY MR. FRIEDMAN:

Q Now, as far as the board of directors are concerned, you and your brother are the majority of the board, are you not?

A The three of us.

* * *

DIRECT EXAMINATION

63 BY MR. DONNELLY:

Q Mr. Prati, will you tell the Commissioner what--Excuse me, I will put it this way:

On the day of the unfortunate death of Mr. Johnson, at what time during the day did you meet with Mr. Johnson?

* * *

64 Q What time was that and for what purpose?

A I met him about noon. I don't know exactly. It wasn't prearranged. I just met him at Aldo's. I think he was supposed to meet my brother, in an hour or so, and that is how I met him that day.

Q Where did you go from there?

A Well, to the Washington Golf and Country Club, I would say at 2:00.

Q What did you do there?

A Played golf.

Q Just the three of you?

A Yes. We just had a three-some.

Q A threesome?

A Yes.

Q And what time did you finish golfing that day?

A About 6:30 or 7.

MR. DONNELLY: All right.

Q And after golf, what did you do?

A Well, we had a drink in the Veranda, at the Golf Club with some friends of Bob and myself, and then we went to Aldo's and had dinner in the Garden.

Q What was the purpose of going to Aldo's for dinner?

65 A We just felt like it.

Q Just social, business or what?

A Social. We were together.

Q For dinner?

A Yes, just the three of us. My mother joined us for a few moments. I don't remember whether she had dinner. I don't recall, but she joined us.

Q And how long did that dinner last?

A Oh, we were there until that midnight.

Q Up until midnight?

A Mr. Dobal came in, not prearranged, bur he came with a friend of his. I don't recall how many were in their party,

Mr. Helady, Mr. Dobal, and I don't recall; and then Mr. Dobal joined us after his dinner.

Q What did you do --have a couple of drinks?

A Yes, coffee and a couple of drinks, and--

Q And what happened after 12 o'clock?

A Well, my brother had left with his wife, who had joined us, and then Mr. Johnson, Mr. Dobal, went to another place around the corner, The Black Sheep, and I told them I would meet them there, because I had some things to discuss with my mother.

Q Do you have any idea why they went to the Black Sheep?

A I guess they just wanted to go there, that's all.

66 Q And did you meet them there?

A Yes.

Q Why?

A Just to meet them, because we had been together and I went over to tell them I was not going to stay and I was on my way home, and I left them there.

Q When you got to the Black Sheep, what were they doing?

A Mr. Dobal and Mr. Johnson were at the bar.

* * *

Q Do you know, to your knowledge, whether Mr. Johnson and Mr. Dobal--well, what happened after that?

A I don't know. I left them there. The only thing I knew I was awakened about 3:00 in the morning by the Park Police and told of this accident.

Q Now, Jopra, Inc.; what is Jopra, Inc?

A It is a corporation operating what is known as The Rotunda Restaurant.

Q Who are the owners and operators factually operating now Jopra, Inc.?

* * *

67 Q And what interest did you three have in this business?

A My Johnson had 50 per cent and my brother and I had 25 per cent.

Q Who actually ran the business?

A Well, we all three did to a certain extent, but my brother being president, and due to his inclination and abilities he called most of the shots. The general daily operation, who was going to perform what function, who was going to be maitre d', who was going to be the cook, there was never any problem about it. It just evolved that way, that Henry took this responsibility and handled it. In that particular case.

But we were all responsible for different things in the business that came up. Our abilities fell into different areas, and the actual management of this place on a

daily bsis was my brother's ability, what he was best for.

68 Q Now, at Ivy Street, were you and your brother also involved in other corporate businesses, like Mr. Johnson?

A Yes.

Q What were they, sir?

A Prajo, which is the Channel House restaurant, and Tijon, which is the Linden Hill operation.

Q And did you and your brother Henry have other business interests which Mr. Johnson was involved in?

A Yes.

Q Where were these businesses referred to managed from: where was the physical location of the management insofar as you, your brother and Mr. Johnson were concerned.

Where were they managed from?

A Well, at this particular time I meaintained an office at Aldo's, which was strictly my brother's and me, and my mother's, which we ran the corporation and restaurant from.

* * *

69 Q ~~Did you~~ and your brother--Strike that.

How did you and your brother get together with Mr. Johnson with respect to your business interests and the restaurants?

A Well, we just know each other for ten or twelve years and became very close friends, and out of this friendship we evolved a business partnership.

70 Q Incidentally, did you have a car at that time?

A Yes, I did.

Q What was the name of it? In what name was it titled?

A I don't know whether it was titled in Aldo's Cafe or the Tijon.

I don't know at that time.

Q And your brother had a car?

A Yes.

Q In what name was that titled?

A In Prajo.

Q In other words, you each had cars titled under the corporate registration?

A Yes.

Q Now, what was Mr. Johnson's function insofar as The Rotunda was concerned?

In other words, was he working for them or was he running them, in fact?

A Well, I don't know how you mean about that.

What do you mean, running it?

Q Was he managing?

A Yes, he was a working partner for all practical purposes. He was a working partner under the management of the Company.

Q Was the same true with the other corporate interest that he had

71 A Yes. We didn't have a designated function. Like, You better open up today and close tomorrow.

It wasn't confined to any particular rule,or things of this nature, but I would consider him a partner of our management team, surely. Nor did I have a specific hour to open up and close.

Q As I understand it, now, the stock in Jopra particularly was just among the three of you?

A That is correct.

Q And at the end of the year, if there was a profit you would do what, sir?

A Well, our profits was to split three ways. This was our way of running things regardless of the stock ownership, but we did not contemplate profits. At that time our indebtedness was at a hundred thousand, so we did not have proits under consideration.

But as far as working together, we never had any problems. Of course this was a relatively new corporation and we were highly financed, and so profits were not a problem at this time, to see who was going to get what, but we always contemplated that what we drew we would draw equally.

Q What was the purpose of your placing the cars in the names of these corporations?

A We needed automobiles to get around in, to go

72 various places or hire taxis.

It had a better write-off position if the Corporation owned them.

MR. DONNELLY: All right.

QAnd as far as you were concerned, having the Corporation own it, you could write it off?

A Surely.

Q And these cars were for business and personal use?

A I am sure they were:

* * *

73 Q She was an endorser on the obligation of Jopra?

A That's right.

Q Now, your answer, the employer's answer, states there was business conducted at Aldo's, was there not?

A I don't recall any particular business being conducted at Aldo's.

The only thing I can say, we had been out, had a lovely day; we had played golf. We talked business if it came up. Naturally, it was a great motivator in our lives. It brought us together.

We discussed business perhaps and perhaps not. We spent so many hours together every day, and I am sure busi-

74 ness came up, whether we were playing golf or at the office.

Q What I am getting at, the first employer's report states: "Upon the conclusion of their business at dinner" so there was some business discussed at Aldo's?

A It may have been, it may have been. But the fact that we got together for dinner was not a business meeting.

Q Did Mr. Johnson, who was Secretary-Treasurer, I suppose that means he probably signed checks. Did Mr. Johnson sign checks at Jopra?

A Surely. We all three did.

Q Did he bring customers into the place?

A Into where?

Q Into The Rotunda?

A What do you mean: Did he bring in?

Q Did he arrange parties for people?

A I am sure of that. Certainly. He had a wide, varied acquaintance, and I am sure he knew people who would call up and say, "Will you get me into The Rotunda"?

I am sure of that.

Q Did he greet customers when they came into The Rotunda restaurant; people that he knew?

A Certainly. We were there and greeted everybody that we knew.

Q So he was doing things besides just being Secretary-Treasurer?

75 A Of course. Of course. Secretary-Treasurer is more than just signing checks. This was more than a partnership.

Q Well, since Mr. Johnson's death, you have acquired his stock in Jopra --I don't mean you; his stock interest

in Jopra has been sold, has it not?

A Yes, it has.

Q And at this time the estate is not a stockholder of Jopra?

A No. The stock is in escrow.

* * *

76-77 THE DEPUTY COMMISSIONER: So I might be clear, I think I heard you refer to Aldo's.

THE WITNESS: Aldo's Cafe was a separate restaurant that Mr. Johnson had no interest in. That is on New Hampshire Avenue, and that is where we had our dinner, Aldo's Cafe, which is no longer in existence. It is a big hole in the ground.

* * *

78 MR. FRIEDMAN: The only restaurant that Jopra had was Jopra, Inc.?

THE WITNESS: Yes; The Rotunda. The Rotunda, that is all it has today.

RESPONDENT'S EXHIBIT NO. A

BUSINESS FILE CARD

ADDRESS # 30 Ivy St TYPE OF BUSINESS Restaruant

FIRM NAME Aido's Rotcunda BUSINESS PHONE # 546 2255

	NAME	ADDRESS	TELEPHONE
OWNER	Robert J D Johnson	3108 ~~XXXXXX~~ Garfield St NW	337 1153
MANAGER	Henry Prati	10209 Farnham Dr Bethesda Md	Em 5 1589
EMPLOYEE	Felice B Orcino 6714 25th Ave Hyatt Md		Ha 2 7956
EMPLOYEE			
EMPLOYEE			

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,103

SANDRA R. JOHNSON,
Individually and on behalf of her minor child
DARE ELIZABETH JOHNSON,
Appellants,

v.

W. L. MASSEY
Deputy Commissioner, United States Department of Labor, Bureau of Employee's Compensation, District of Columbia Compensation District
Appellee,

and

CONTINENTAL CASUALTY COMPANY,
Intervenor-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE APPELLANTS

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DARE ELIZABETH JOHNSON,
Appellants,

v.

W. L. MASSEY
Deputy Commissioner, United States Department of Labor, Bureau of Employee's Compensation, District of Columbia Compensation District
Appellee,

and

CONTINENTAL CASUALTY COMPANY,
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BRIEF OF THE APPELLANTS

STATEMENT OF ISSUES*

Whether the widow and child of a deceased employee whose injury and death occurred while driving his employer's automobile on a direct route to his home were entitled to compensation under

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*This case has not previously been before this Court.

the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901 et seq.

THE QUESTION PRESENTED

The question presented is whether the Appellants, the widow and child of an employee of Jopra, Inc. are entitled to death benefits under the Longshoremen's and Harbor Workers' Compensation Act for the death of their husband and father sustained while driving the employer's automobile on a direct route to his home, where there is no substantial evidence to overcome the presumption that the claim comes within the provision of the Act.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon the Act of October 31, 1951, 65 Stat. 726, as amended, 28 U.S. Code 1291, and the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 424, as amended, 33 U. S. Code 901-50, made applicable to the District of Columbia by D. C. Code, Title 36, Sec. 501.

SUMMARY OF ARGUMENT

In claims for benefits under the Longshoremen's and Harbor Workers' Compensation Act, there is a statutory presumption that the employee's death while driving an automobile furnished him by the employer, arises out of and was caused by the employment. There is no substantial evidence in the record to the contrary.

STATEMENT OF THE CASE

This case arises out of the claim by the widow and child for death benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code 921, Title 36, Sec. 501 U.S. Code). Compensation was denied by the Deputy Commissioner. Action to set aside the Compensation Order was filed in United States District Court for the District of Columbia (Complaint R-1)(JA-2). The Court below entered an order granting motion for summary judgment filed by appellee Deputy Commissioner and dismissed the action with prejudice. (R-10)(JA-2)

The Deputy Commissioner found (R-1, Ex. A), that on July 1, 1965, Robert J. D. Johnson, the employee, while enroute to his home, was involved in an automobile accident resulting in his death; that his employer, Jopra, Inc., was subject to the provisions of the Act and was insured by the Intervenor. The employee and other stockholders of Jopra, Inc., also had interest in other corporations, including the Channel House, a restaurant from which the employee had left shortly before the accident, that the automobile utilized by him was owned by Jopra, Inc., the employer; that the employee was authorized to and used the automobile in all of his varied business interests and in the conduct of his personal affairs; he also found that deceased departed from the Channel House with a "friend" as a passenger. The record shows this friend was a good customer of the employer. Notwithstanding these findings which establish that the injury and death was compensable, the Deputy Commissioner concluded that the injury and death "did not arise out of and in the course of his employment."

For the reasons hereinafter set forth, it is respectfully submitted that the Order of the Court dismissing appellant's action and the Deputy Commissioner's Order denying compensation is erroneous as

a matter of law and is unsupported by any substantial evidence and should be reversed and compensation allowed to the widow and child of the deceased.

ARGUMENT

I

THE DEPUTY COMMISSIONER AND THE COURT BELOW WERE IN ERROR IN FAILING TO HOLD THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO OVERCOME THE PRESUMPTION THAT THE APPELLANTS' CLAIM CAME WITHIN THE PROVISIONS OF THE ACT.

The Deputy Commissioner's decision gives no weight to the provisions of 33 USC Sec. 920 (a) which reads:

> "In any proceeding for the enforcement of a claim for compensation under the Chapter, *it shall be presumed, in the absence of substantial evidence to the contrary, (a) that the claim comes within the provision of this chapter****"

This presumption, in this liberal statute, places the burden on the employer to advance "substantial evidence" in order to defeat a claim of an employee. It puts the burden of coming forward with substantial evidence on the employer. "Substantial evidence" must be such as to induce conviction. *Butler v. District Parking Management Co.*, 124 U.S.App.D.C. 195, 363 F.2d 682 (1966). The presumption of compensability is founded in the humanitarian nature of the Act. *Wheatley v. Herman Adler, Deputy Commissioner et al,* No. 20455 decided en banc May 17, 1968, ___ U.S.App.D.C. __, ___ F.2d ___.

The causal relationship of the injury to the employment cannot be questioned because the injury was sustained while driving the em-

ployer's automobile. However, a causal relationship is not essential under the Supreme Court of the United States decision in *O'Leary v. Brown-Pacific-Maxon, Inc.*, et al, 340 U.S. 504, 95 L.Ed. 483 (1950) and the above cited *Wheatley* decision of this Court. The Supreme Court at p. 506, 507, stated:

> "Workmen's Compensation is not confined by common-law conceptions to the scope of employment***. The test of recovery is not a causal relation between the nature of the employment of the injured person and the accident***. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to the employer. *All that is required is that the obligations or conditions of employment create the 'zone of special danger' out of which the injury arose.*"

The *Brown-Pacific-Maxon* decision involved the drowning of an employee, on recreation away from his job site, while attempting to rescue a non-employee who was drowning. Compensation was allowed. Cf. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 13 L. Ed. 2d 895 (1965) with similar facts.

The presumption in § 920(a) requires the claim to be allowed unless it would be "irrational to do so or without substantial evidenc in the record as a whole."

The Court in *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., supra,* after quoting the above language from *Brown-Pacific-Maxon* decision stated:

> "And borrowing from language in *Matter of Waters v. Taylor Co.*, 218 NY 248, 252, 112 NE 727, 728, the court in Brown-Pacific-Maxon drew the line only at cases where an employee had become *'so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries*

> *suffered by him arose out of and in the course of his employment.'* 340 U.S. at 507, 95 L.Ed. 486. This standard is in accord with the humanitarian nature of the Act as exemplified by the statutory command that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed in the absence of substantial evidence to the contrary. . .[t]hat the claim comes within the provisions of this chapter." Sec. 20(a), 33 USC §920(a)."

It is respectfully submitted that the decision of the Deputy Commissioner is "not in accordance with law" in that he failed to apply the correct rule established by the Supreme Court in the *Brown-Pacific-Maxon* and *Smith Hinchman* and *Grylls* decisions, *supra.*

The decision of the Court below and the Deputy Commissioner's rejection of the claim disregard the specific holdings in the cited cases that the injury need not be associated with any of the employment activities. They overlook the undisputed evidence that the decedent at the time of his death was authorized to drive, and was driving the employer's automobile furnished to him by his employer to travel to and from his home, that he was on a direct and customarily used route to his home, that the deceased was unrestricted as to the use of the car (JA-17, Tr. 72) and that the decedent was subject to and had been called from his home on emergency calls at all hours of the night and required the car for that among other business purposes. "There were many times when my husband was called at three or four o'clock in the morning to go down to the Rotunda—they had several cars stolen. He had to get up in the middle of the night and go down and make sure that everything was all right." (JA-18, Tr.29, Ex. A)(JA-40) The use of the car at the time of the accident was within the scope of the employers' authorization.

II

THE DECEDENT'S DEATH, WHILE DRIVING A CAR FURNISHED TO HIM BY HIS EMPLOYER, WAS DIRECTLY RELATED TO HIS EMPLOYMENT.

The Deputy Commissioner, as we have established above, was in error as a matter of law in that he failed to hold that the presumption of compensability controlled and in applying the wrong test of compensability. The Deputy Commissioner's finding that the death of the employee was not employment related is immaterial as a matter of law, *Brown-Pacific-Maxon, supra,* is contrary to the other findings of the Deputy Commissioner and is clearly unsupported by any substantial evidence.

The Deputy Commissioner found as a fact that the decedent was enroute to his home from the Channel House Restaurant (one of three restaurants in which he and the other stockholders of the employer owned stock interests). The business of the three corporations was conducted from the same location, 30 Ivy Street, S.E. As Mr. Prati testified, (Tr. p. 71) the main office of all three corporations was at 30 Ivy Street, S.E. The same employees took care of all three corporations and as Mr. Prati testified, the businesses were interrelated. "They could get a better price if they dealt with one person for two restaurants." (JA-25, Tr. 44). The automobile driven by deceased was owned by the employer, Jopra, Inc. The employer owned the car, furnished the upkeep and each of the officers had an automobile, owned and registered in each corporation for tax purposes, which they used in conducting the business of all three corporations. (JA-16, Tr. 71-72).

The use of the automobile in this case has a much closer relationship to the employment than the jeeps in *Gondeck v. Pan American World Airways,* 382 U.S. 25, 15 L.Ed.2d 21 (1965), the latest Supreme Court decision on the general subject.

The liability of the employer in compensation cases arising out of the use of automobiles by the employee is set forth in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 91 L.Ed. 1028 (1946) as follows:

> "Under the District of Columbia Workmen's Compensation Act, at least four exceptions have been recognized by the Court of Appeals: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer. *Ward v. Cardillo*, 77 App. D.C. 343, 135 F.2d 260, 262. See also *Lake v. Bridgeport*, 102 Conn. 337, 128 A 782."

In the instant case the company car was being used for the purpose for which it was furnished to the decedent, among which purposes was to drive to and from his home where the car was regularly kept for use in case of emergencies. The record contains undisputed evidence that the decedent was subject to call in emergencies. His name was listed for emergencies in the police files (Ex. 1), and he had been called a number of times. (Tr. 29). It was necessary for decedent to drive to his home to have the car available to have transportation for emergencies.

The evidence that the employee used the car at his home for emergency purposes was completely ignored by the Deputy Commissioner and the Court below.

Joseph R. Navalaney, a police officer assigned to the Fifth Precinct testified as a representative of the Police Department and by his testimony the business file card of the Rotunda, the Defendant's restaurant (Tr. 26) which is on file in the Police Department was

introduced. Navaleney testified "in case of emergency or anything happens in a business establishment we notify the people named on this card" (JA-6, Tr. 9-10). The card (Ex. A)(JA-40) names Robert J. D. Johnson, the decedent, as one of the persons to be called. It gives his address and telephone number.

Mrs. Johnson testified (JA-15, R.29) that there were many times when her "husband was called at three or four o'clock in the morning to go down to the Rotunda. They had several cars stolen. He had to get up in the middle of the night and go down and make sure that everything was all right." (JA-15, R.29) and he used the car in going to the Rotunda and back again to his home (JA-16, R.30). The car was supplied by the Defendant from the start of its business. (JA-17). The car was kept at night "either in front of our home or in the rear of our home" (JA-19, R. 33). This was necessary. We quote from R.34:

> Q. Now, I think you mentioned a minute ago that he was also subject to emergency calls at home on company's business.
> A. Yes.
>
> Q. If he had such calls, what means of transportation did your husband use in the performance of these calls?
> A. The company car. (JA-21, R.34). The company car was the only car available to him (JA-21, R.35).

This testimony was undisputed. The car was paid for by the company. One of the uses of it was "to go home from his office and from his home to his office." The company paid for the upkeep. (JA-16)

Cf. *Kramer v. City of Philadelphia,* 179 Pa. Supp. 129, 116 A.2d 280, in which a policeman was allowed compensation for an injury while proceeding after dinner to drive the city-furnished motor-

cycle to a private garage where he was accustomed to drive it and park it for use in an emergency or to ride to work the next day.

III

THE DECEASED WAS DRIVING THE COMPANY CAR WITH PERMISSION OF THE EMPLOYER ENROUTE TO HIS HOME. HIS INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

The Deputy Commissioner omits from his meagre finding the undisputed testimony that among the business purposes for which the car was furnished the deceased was in going to and from his home, in going to and from various other businesses in which the parties held interest and for use in emergencies and that the upkeep of the car was paid for by the employer and that the car was kept at home at night.

In addition to the employer's authorization to the employee to use the car at all times, his use of the company car to go home after a meeting at which business was discussed and after visiting a related business to "check up", (JA-8) is so directly connected to the services of the employer and his employment related, as to require an award of compensation.

The employer must be charged with the recognized fact that when he furnishes an automobile for use on the city streets he is placing a dangerous instrument in the hands of the employee and subjecting the employee to risks incident to driving a car. When the employee is injured while authorized to use the car, as here, while on a regular route to his home, where he maintains an office and uses the car for emergency purposes and for driving to and from his home, such driving risks are hazards which arise out of and in the course of his employment.

See *New Amsterdam Casualty Co. v. Hoage*, 62 F.2d 468, 61 App.D.C. 306 (1932), in which our Court of Appeals said:

> "It is now held by the greater weight of the authorities that, if an employee in the course of his employment has to pass along the public streets and thereby sustains an accident by reason of the risks incident to the streets, the accident arises out of as well as 'in the course of' his employment."

In *Self v. Hansen*, 305 F.2d 699 (9th Cir. 1963) an injury sustained in a car supplied by the employer for use anywhere was held compensable while employee was using the car for personal purposes. The employee was sitting with her supervisor in the cab of a small truck parked on the shore of Guam when an Army truck crashed into the truck injuring Mrs. Self. She sought and was allowed compensation.

The Court held that since the supervisor was authorized to use the vehicle for recreational purposes and the employer furnished the upkeep, his use of the car was in the course of his employment. The supervisor had agreed to drive Mrs. Self from school to her home because of her "personal attraction." Instead of driving her home he drove to a Club to arrange a party for a departing controller. They drove from there to a breakwater to "take a look at a new Japanese ship in the harbor***". The decision shows an application of the liberal purpose of the Act to protect employees.

The test applied in *Self v. Hansen* was whether the employer would be liable for injuries caused by the use of the car. If so, the employee is entitled to compensation. The Court said:

> "To summarize this conclusion, it is our view that both Muzy's and Mrs. Self's conduct was, at that time and place and in that vehicle, *within the scope*

> *of their employer's authorization* to such extent that had they been the cause, not the victims, of the negligent driving, their employers would have been liable to injured third parties for their acts. We think the same rule applies in this compensation case."

CONCLUSION

In conclusion, it is respectfully submitted that the decision of the Deputy Commissioner and the Court is not in accordance with law and is unsupported by any substantial evidence. The decision below should be reversed and the case remanded to the District Court with instructions to remand to the Deputy Commissioner with instructions to make an appropriate compensation award to the appellants.

Respectfully,

HARRY FRIEDMAN
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HO 2-6010
Counsel for Appellants

IN THE

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The question presented is whether the Appellants, the widow and child of an employee of Jopra, Inc. are entitled to death benefits under the Longshoremen's and Harbor Workers' Compensation Act for the death of their husband and father sustained while driving the employer's automobile on a direct route to his home, where there is no substantial evidence to overcome the presumption that the claim comes within the provision of the Act.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is based upon the Act of October 31, 1951, 65 Stat. 726, as amended, 28 U.S. Code 1291, and the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 424, as amended, 33 U. S. Code 901-50, made applicable to the District of Columbia by D. C. Code, Title 36, Sec. 501.

SUMMARY OF ARGUMENT

In claims for benefits under the Longshoremen's and Harbor Workers' Compensation Act, there is a statutory presumption that the employee's death while driving an automobile furnished him by the employer, arises out of and was caused by the employment. There is no substantial evidence in the record to the contrary.

STATEMENT OF THE CASE

This case arises out of the claim by the widow and child for death benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code 921, Title 36, Sec. 501 U.S. Code). Compensation was denied by the Deputy Commissioner. Action to set aside the Compensation Order was filed in United States District Court for the District of Columbia (Complaint R-1)(JA-2). The Court below entered an order granting motion for summary judgment filed by appellee Deputy Commissioner and dismissed the action with prejudice. (R-10)(JA-2)

The Deputy Commissioner found (R-1, Ex. A), that on July 1, 1965, Robert J. D. Johnson, the employee, while enroute to his home, was involved in an automobile accident resulting in his death; that his employer, Jopra, Inc., was subject to the provisions of the Act and was insured by the Intervenor. The employee and other stockholders of Jopra, Inc., also had interest in other corporations, including the Channel House, a restaurant from which the employee had left shortly before the accident, that the automobile utilized by him was owned by Jopra, Inc., the employer; that the employee was authorized to and used the automobile in all of his varied business interests and in the conduct of his personal affairs; he also found that deceased departed from the Channel House with a "friend" as a passenger. The record shows this friend was a good customer of the employer. Notwithstanding these findings which establish that the injury and death was compensable, the Deputy Commissioner concluded that the injury and death "did not arise out of and in the course of his employment."

For the reasons hereinafter set forth, it is respectfully submitted that the Order of the Court dismissing appellant's action and the Deputy Commissioner's Order denying compensation is erroneous as

a matter of law and is unsupported by any substantial evidence and should be reversed and compensation allowed to the widow and child of the deceased.

ARGUMENT

I

THE DEPUTY COMMISSIONER AND THE COURT BELOW WERE IN ERROR IN FAILING TO HOLD THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO OVERCOME THE PRESUMPTION THAT THE APPELLANTS' CLAIM CAME WITHIN THE PROVISIONS OF THE ACT.

The Deputy Commissioner's decision gives no weight to the provisions of 33 USC Sec. 920 (a) which reads:

> "In any proceeding for the enforcement of a claim for compensation under the Chapter, *it shall be presumed, in the absence of substantial evidence to the contrary, (a) that the claim comes within the provision of this chapter****"

This presumption, in this liberal statute, places the burden on the employer to advance "substantial evidence" in order to defeat a claim of an employee. It puts the burden of coming forward with substantial evidence on the employer. "Substantial evidence" must be such as to induce conviction. *Butler v. District Parking Management Co.*, 124 U.S.App.D.C. 195, 363 F.2d 682 (1966). The presumption of compensability is founded in the humanitarian nature of the Act. *Wheatley v. Herman Adler, Deputy Commissioner et al*, No. 20455 decided en banc May 17, 1968, ___ U.S.App.D.C. __, ___ F.2d ___.

The causal relationship of the injury to the employment cannot be questioned because the injury was sustained while driving the em-

ployer's automobile. However, a causal relationship is not essential under the Supreme Court of the United States decision in *O'Leary v. Brown-Pacific-Maxon, Inc.*, et al, 340 U.S. 504, 95 L.Ed. 483 (1950) and the above cited *Wheatley* decision of this Court. The Supreme Court at p. 506, 507, stated:

> "Workmen's Compensation is not confined by common-law conceptions to the scope of employment***. The test of recovery is not a causal relation between the nature of the employment of the injured person and the accident***. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to the employer. *All that is required is that the obligations or conditions of employment create the 'zone of special danger' out of which the injury arose.*"

The *Brown-Pacific-Maxon* decision involved the drowning of an employee, on recreation away from his job site, while attempting to rescue a non-employee who was drowning. Compensation was allowed. Cf. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 13 L. Ed. 2d 895 (1965) with similar facts.

The presumption in § 920(a) requires the claim to be allowed unless it would be "irrational to do so or without substantial evidenc in the record as a whole."

The Court in *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., supra,* after quoting the above language from *Brown-Pacific-Maxon* decision stated:

> "And borrowing from language in *Matter of Waters v. Taylor Co.*, 218 NY 248, 252, 112 NE 727, 728, the court in Brown-Pacific-Maxon drew the line only at cases where an employee had become *'so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries*

> *suffered by him arose out of and in the course of his employment.'* 340 U.S. at 507, 95 L.Ed. 486. This standard is in accord with the humanitarian nature of the Act as exemplified by the statutory command that "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed in the absence of substantial evidence to the contrary. . .[t]hat the claim comes within the provisions of this chapter." Sec. 20(a), 33 USC §920(a)."

It is respectfully submitted that the decision of the Deputy Commissioner is "not in accordance with law" in that he failed to apply the correct rule established by the Supreme Court in the *Brown-Pacific-Maxon* and *Smith Hinchman* and *Grylls* decisions, *supra.*

The decision of the Court below and the Deputy Commissioner's rejection of the claim disregard the specific holdings in the cited cases that the injury need not be associated with any of the employment activities. They overlook the undisputed evidence that the decedent at the time of his death was authorized to drive, and was driving the employer's automobile furnished to him by his employer to travel to and from his home, that he was on a direct and customarily used route to his home, that the deceased was unrestricted as to the use of the car (JA-17, Tr. 72) and that the decedent was subject to and had been called from his home on emergency calls at all hours of the night and required the car for that among other business purposes. "There were many times when my husband was called at three or four o'clock in the morning to go down to the Rotunda—they had several cars stolen. He had to get up in the middle of the night and go down and make sure that everything was all right." (JA-18, Tr.29, Ex. A)(JA-40) The use of the car at the time of the accident was within the scope of the employers' authorization.

II

THE DECEDENT'S DEATH, WHILE DRIVING A CAR FURNISHED TO HIM BY HIS EMPLOYER, WAS DIRECTLY RELATED TO HIS EMPLOYMENT.

The Deputy Commissioner, as we have established above, was in error as a matter of law in that he failed to hold that the presumption of compensability controlled and in applying the wrong test of compensability. The Deputy Commissioner's finding that the death of the employee was not employment related is immaterial as a matter of law, *Brown-Pacific-Maxon, supra,* is contrary to the other findings of the Deputy Commissioner and is clearly unsupported by any substantial evidence.

The Deputy Commissioner found as a fact that the decedent was enroute to his home from the Channel House Restaurant (one of three restaurants in which he and the other stockholders of the employer owned stock interests). The business of the three corporations was conducted from the same location, 30 Ivy Street, S.E. As Mr. Prati testified, (Tr. p. 71) the main office of all three corporations was at 30 Ivy Street, S.E. The same employees took care of all three corporations and as Mr. Prati testified, the businesses were interrelated. "They could get a better price if they dealt with one person for two restaurants." (JA-25, Tr. 44). The automobile driven by deceased was owned by the employer, Jopra, Inc. The employer owned the car, furnished the upkeep and each of the officers had an automobile, owned and registered in each corporation for tax purposes, which they used in conducting the business of all three corporations. (JA-16, Tr. 71-72).

The use of the automobile in this case has a much closer relationship to the employment than the jeeps in *Gondeck v. Pan American World Airways,* 382 U.S. 25, 15 L.Ed.2d 21 (1965), the latest Supreme Court decision on the general subject.

The liability of the employer in compensation cases arising out of the use of automobiles by the employee is set forth in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 91 L.Ed. 1028 (1946) as follows:

> "Under the District of Columbia Workmen's Compensation Act, at least four exceptions have been recognized by the Court of Appeals: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer. *Ward v. Cardillo*, 77 App. D.C. 343, 135 F.2d 260, 262. See also *Lake v. Bridgeport*, 102 Conn. 337, 128 A 782."

In the instant case the company car was being used for the purpose for which it was furnished to the decedent, among which purposes was to drive to and from his home where the car was regularly kept for use in case of emergencies. The record contains undisputed evidence that the decedent was subject to call in emergencies. His name was listed for emergencies in the police files (Ex. 1), and he had been called a number of times. (Tr. 29). It was necessary for decedent to drive to his home to have the car available to have transportation for emergencies.

The evidence that the employee used the car at his home for emergency purposes was completely ignored by the Deputy Commissioner and the Court below.

Joseph R. Navalaney, a police officer assigned to the Fifth Precinct testified as a representative of the Police Department and by his testimony the business file card of the Rotunda, the Defendant's restaurant (Tr. 26) which is on file in the Police Department was

introduced. Navaleney testified "in case of emergency or anything happens in a business establishment we notify the people named on this card" (JA-6, Tr. 9-10). The card (Ex. A)(JA-40) names Robert J. D. Johnson, the decedent, as one of the persons to be called. It gives his address and telephone number.

Mrs. Johnson testified (JA-15, R.29) that there were many times when her "husband was called at three or four o'clock in the morning to go down to the Rotunda. They had several cars stolen. He had to get up in the middle of the night and go down and make sure that everything was all right." (JA-15, R.29) and he used the car in going to the Rotunda and back again to his home (JA-16, R.30). The car was supplied by the Defendant from the start of its business. (JA-17). The car was kept at night "either in front of our home or in the rear of our home" (JA-19, R. 33). This was necessary. We quote from R.34:

> Q. Now, I think you mentioned a minute ago that he was also subject to emergency calls at home on company's business.
> A. Yes.
> Q. If he had such calls, what means of transportation did your husband use in the performance of these calls?
> A. The company car. (JA-21, R.34). The company car was the only car available to him (JA-21, R.35).

This testimony was undisputed. The car was paid for by the company. One of the uses of it was "to go home from his office and from his home to his office." The company paid for the upkeep. (JA-16)

Cf. *Kramer v. City of Philadelphia,* 179 Pa. Supp. 129, 116 A.2d 280, in which a policeman was allowed compensation for an injury while proceeding after dinner to drive the city-furnished motor-

cycle to a private garage where he was accustomed to drive it and park it for use in an emergency or to ride to work the next day.

III

THE DECEASED WAS DRIVING THE COMPANY CAR WITH PERMISSION OF THE EMPLOYER ENROUTE TO HIS HOME. HIS INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

The Deputy Commissioner omits from his meagre finding the undisputed testimony that among the business purposes for which the car was furnished the deceased was in going to and from his home, in going to and from various other businesses in which the parties held interest and for use in emergencies and that the upkeep of the car was paid for by the employer and that the car was kept at home at night.

In addition to the employer's authorization to the employee to use the car at all times, his use of the company car to go home after a meeting at which business was discussed and after visiting a related business to "check up", (JA-8) is so directly connected to the services of the employer and his employment related, as to require an award of compensation.

The employer must be charged with the recognized fact that when he furnishes an automobile for use on the city streets he is placing a dangerous instrument in the hands of the employee and subjecting the employee to risks incident to driving a car. When the employee is injured while authorized to use the car, as here, while on a regular route to his home, where he maintains an office and uses the car for emergency purposes and for driving to and from his home, such driving risks are hazards which arise out of and in the course of his employment.

See *New Amsterdam Casualty Co. v. Hoage,* 62 F.2d 468, 61 App.D.C. 306 (1932), in which our Court of Appeals said:

> "It is now held by the greater weight of the authorities that, if an employee in the course of his employment has to pass along the public streets and thereby sustains an accident by reason of the risks incident to the streets, the accident arises out of as well as 'in the course of' his employment."

In *Self v. Hansen,* 305 F.2d 699 (9th Cir. 1963) an injury sustained in a car supplied by the employer for use anywhere was held compensable while employee was using the car for personal purposes. The employee was sitting with her supervisor in the cab of a small truck parked on the shore of Guam when an Army truck crashed into the truck injuring Mrs. Self. She sought and was allowed compensation.

The Court held that since the supervisor was authorized to use the vehicle for recreational purposes and the employer furnished the upkeep, his use of the car was in the course of his employment. The supervisor had agreed to drive Mrs. Self from school to her home because of her "personal attraction." Instead of driving her home he drove to a Club to arrange a party for a departing controller. They drove from there to a breakwater to "take a look at a new Japanese ship in the harbor***". The decision shows an application of the liberal purpose of the Act to protect employees.

The test applied in *Self v. Hansen* was whether the employer would be liable for injuries caused by the use of the car. If so, the employee is entitled to compensation. The Court said:

> "To summarize this conclusion, it is our view that both Muzy's and Mrs. Self's conduct was, at that time and place and in that vehicle, *within the scope*

> *of their employer's authorization* to such extent that had they been the cause, not the victims, of the negligent driving, their employers would have been liable to injured third parties for their acts. We think the same rule applies in this compensation case."

CONCLUSION

In conclusion, it is respectfully submitted that the decision of the Deputy Commissioner and the Court is not in accordance with law and is unsupported by any substantial evidence. The decision below should be reversed and the case remanded to the District Court with instructions to remand to the Deputy Commissioner with instructions to make an appropriate compensation award to the appellants.

Respectfully,

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HO 2-6010
Counsel for Appellants

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TABLE OF CASES

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OTHER REFERENCES

ISSUE PRESENTED

In the opinion of appellee deputy commissioner, the sole issue presented is whether the record, considered as a whole, supports the deputy commissioner's finding that since the fatal injury of the deceased was not employment related, but, instead, arose from activities of a nature personal to the employee having no connection with the named employer, no workmen's compensation benefits are payable for such death.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,103

SANDRA R. JOHNSON, Individually and on behalf of her minor child DARE ELIZABETH JOHNSON, APPELLANTS

v.

W. L. MASSEY, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, District of Columbia Compensation District, APPELLEE

and

CONTINENTAL CASUALTY COMPANY, INTERVENOR-APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR THE APPELLEE DEPUTY COMMISSIONER

COUNTERSTATEMENT OF THE CASE

This cause arose upon an action instituted by appellants, plaintiffs below, to review and set aside as not in accordance with law a compensation order filed by W. L. Massey, Deputy Commissioner, Bureau of Employees' Compensation, United States Department of Labor, on June 27,

1967, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901 *et seq.*, and as made applicable to the District of Columbia by the Act of May 17, 1928, 45 Stat. 600, D.C. Code 36-501.

In that order, the workmen's compensation claim of appellant, Sandra R. Johnson, filed on behalf of herself as surviving wife of Robert J. D. Johnson (hereinafter referred to as "deceased") and their minor child, Dare Elizabeth Johnson, was rejected for the reason that the death of the deceased was found by the appellee deputy commissioner not to have been related to the deceased's employment, i.e., death did not arise out of and in the course of that employment. Following rejection, a complaint was filed in the Court below which, in effect, took issue with the foregoing finding. To the complaint, the deputy commissioner filed a motion for summary judgment, and the Court below, upon review of the record, sustained the deputy commissioner's finding, granting summary judgment in favor of the deputy commissioner and the intervening defendant, Continental Casualty Company. This appeal followed the dismissal of the action below.

THE COMPENSATION ORDER

The compensation order complained of reads, in pertinent part, as follows:

> Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following
>
> ### FINDINGS OF FACT
>
> 1. That on July 2, 1965, Robert J. D. Johnson, hereinafter referred to as "employee" was in the employ of the employer above named, whose address is 30 Ivy Street, Southeast, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928,

entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Continental Casualty Company;

2. That on the said day at approximately 3:00 a.m. while en route to his home from the Channel House Restaurant located at 824 New Hampshire Avenue, Northwest, Washington, District of Columbia, he was involved in an automobile accident, as a consequence of which he suffered multiple injuries resulting in his death immediately thereafter;

3. That on October 17, 1966, Mrs. Sandra R. Johnson filed claim for death benefits in her behalf as widow of the employee, and in behalf of Dare Elizabeth Johnson, minor child of the employee, alleging that the injury and death of the employee arose out of and in the course of his employment for the said employer; that the claim was filed within the time limitations of sections 13(a) and 30(f) of the Act;

4. That the employee had a fifty per cent interest in the employer herein and was designated as secretary-treasurer of the said corporation; that in addition thereto the employee owned approximately a third interest in each of two other corporations, Prajo, which operated the Channel House Restaurant, and Tijon, which operated the Linden Hill Restaurant; that the general daily management of the Rotunda Restaurant (the trade name of employer herein) was handled by another partner, who was also president of the said employer; that the business of the three corporations above-named was conducted from the employer's office at 30 Ivy Street, Southeast, Washington, District of Columbia; that the automobile utilized by the employee was registered in the name of the employer herein; that the employee used the said vehicle in conducting all of his varied business interests and in the conduct of his personal affairs;

5. That on July 1, 1965 at approximately 2:00 p.m., the employee and his two partners in the above-

named corporations (including the employer herein) went from Aldo's Cafe to the Washington Golf and Country Club where they played golf until approximately 7:00 p.m.; that thereafter they returned to Aldo's Cafe for dinner and remained there until approximately midnight; that upon leaving Aldo's, the employee and a friend went to the Black Sheep Restaurant where they remained for approximately an hour, and from there proceeded to the Channel House Restaurant; that approximately forty-five minutes later the employee, with the friend as a passenger, departed the Channel House for the employee's home and while so en route, sustained the fatal injuries, as found above;

6. That the employee at the time of his death had not been serving in any official capacity, nor had he been performing any services for the employer herein; that the employee's activities, as found above were personal to the employee and had no connection or association with the said employment.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claims of Mrs. Sanda R. Johnson and Dare Elizabeth Johnson, for death benefits be and they are hereby REJECTED for the following reasons:

1. That the injury and death of the employee did not arise out of and in the course of the employment.

SUMMARY OF ARGUMENT

Since the evidence in the record considered as a whole clearly supports the deputy commissioner's factual finding that claimant, appellant herein, had failed to establish that the deceased's fatal injury arose out of any work activity for the employer named in the claim for compensation, the Court below correctly concluded that this finding was to be accepted upon judicial review. *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965); *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Phoenix Assurance Company* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *Hurley* v. *Lowe*, 83 U.S. App. D.C.

123, 168 F.2d 553 (1948), *cert. denied* 334 U.S. 828; *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697, 698 (1941); *General Accident Fire & Life Assurance Corporation* v. *Britton*, 103 U.S. App. D.C. 135, 255 F.2d 544 (1958); *Gooding* v. *Willard*, 209 F.2d 913, 916 (2d Cir. 1954).

ARGUMENT

The deputy commissioner's finding that the fatal injury of the deceased was not employment related is supported by the record considered as a whole and is not irrational.

(a) *Scope of Review*

The standard for judicial review in cases arising under the Longshoremen's Act has been carefully delineated by the Supreme Court. If the findings of the deputy commissioner are supported by substantial evidence, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951), or if the deputy commissioner's holding is not irrational, *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359, 363 (1965), or if the order under review is not "forbidden by the law", *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947), the decision of the deputy commissioner is to be sustained. The fact that the evidence may permit the drawing of diverse inferences will not warrant disturbing the inference or inferences drawn by the deputy commissioner if his selection is reasonable. *Cardillo* v. *Liberty Mutual Insurance Co., supra; Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935); *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162 (1933).

These principles have found acceptance by the Court of Appeals for the District of Columbia in numerous cases under the Longshoremen's Act. *Wolff* v. *Britton*, 177 U.S. App. D.C. 209, 328 F.2d 181 (1964).[1] Application of

[1] *Phoenix Assurance Company* v. *Britton*, 110 U.S. App. D.C. 118, 289 F.2d 784 (1961); *General Accident Fire & Life Assurance Corporation* v. *Britton*, 103 U.S. App. D.C. 135, 255 F.2d 544

these principles has been made even though the Court, as it said, "might have reached a different conclusion", *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697, 698 (1941), or even in situations where "the Deputy Commissioner was in error as to the legal content of the [statutory] term" involved for consideration on review, *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553, 556 (1948), *cert. denied* 334 U.S. 828. In the latter case the Court relied upon *Cardillo* v. *Liberty Mutual Insurance Co.*, *supra*, 330 U.S. 469 (1947), wherein the Supreme Court had observed that it was immaterial that a deputy commissioner's finding, based upon an inference, was "more legal than factual."

A review of the record here discloses that the deputy commissioner's determination was properly sustained by the District Court.

(b) *The Evidence*

The record in the instant case consists of the typewritten transcript of the administrative hearing held before the deputy commissioner on May 9, 1967, with exhibits.

(1958); *Liberty Mutual Insurance Co.* v. *Britton*, 100 U.S. App. D.C. 236, 243 F.2d 659 (1957); *United States Fidelity & Guaranty Co.* v. *Britton*, 88 U.S. App. D.C. 293, 188 F.2d 674 (1951).

In the recently decided case of *J. V. Vozzolo, Inc.* v. *Britton*, 126 U.S. App. D.C. 259, 377 F.2d 144 (1967), the Court of Appeals reiterated its position, stating:

> The Act authorizes the filing of a claim for compensation and provides that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." It also provides that his compensation order may be set aside on review only "[i]f not in accordance with law." Judicially expressed, his findings "are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." [Citing *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, *supra*, 340 U.S. 504, 508 (1951); *Voehl* v. *Indemnity Insurance Co.*, *supra*, 288 U.S. 162 (1933); *Friend* v. *Britton*, 95 U.S. App. D.C. 141, 220 F.2d 821, cert. denied 350 U.S. 836 (1955); *Robinson* v. *Bradshaw*, 92 U.S. App. D.C. 216, 206 F.2d 435, cert. denied 346 U.S. 899 (1953)]. Our primary task upon this appeal is to determine whether the findings before us survive this test.

With reference to the sole issue that is the subject of review, namely, whether the deceased's fatal injury was related to his employment for the employer designated by claimant, rather than to personal activities having no connection with work for that employer (as found by the deputy commissioner), witnesses testified in part and in effect as follows:

JOSEPH DOBAL: That he is a manufacturer's representative and, as such, does a substantial amount of entertaining (T. 10-11);[2] that on occasions he entertained at the Rotunda Restaurant (the alleged employer, *Jopra*, t/a Rotunda); that he knew the deceased, as well as Henry Prati and Ermanno Prati (business associates of the deceased); that on the evening of July 1, 1965, the witness met the deceased at Aldo's Restaurant on New Hampshire Avenue (in the District of Columbia) between 10:30 p.m. and 11 p.m. (T. 11-12; J.A. 7); that about an hour later, upon leaving the restaurant with a group of friends, the witness again met the deceased in the parking lot (T. 12; J.A. 7); that the deceased offered to drive the witness to his car after he had made two stops, one at the Black Sheep Restaurant to see a Mr. English, and the other at the Channel House Restaurant (where the deceased was part-owner) "to check things there" (T. 13, 18, 19-20, 22; J.A. 7-8);[3] that the witness and the deceased spent about an hour at the Black Sheep but *never met with the above-mentioned Mr. English* because he was out of town (T. 13-14); that the deceased went to the Black Sheep's bar (T. 14, 21; J.A. 8); that the deceased and the witness then went in the former's Cad-

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[2] T. refers to the typewritten transcript of the proceedings before the deputy commissioner.

[3] The record is completely silent as to the relationship, nature or purpose of either stop with reference to the deceased's business at the *Rotunda* corporation where he was Secretary-Treasurer. There was neither identification of Mr. English, whom the deceased never contacted, nor any showing that any "check up" was made. To the contrary, on this latter point the record only manifests socialization by the deceased.

illac to the Channel House, arriving there about 1:30 or 2:00 a.m. (T. 15, 21-22; J.A. 9, 11); that after some 45 minutes they left with the deceased driving towards his home through Rock Creek Park, intending to "drop himself off [at home] and let [the witness] take the car" (T. 15-16, 22-24; J.A. 9-10); that the acident (which resulted in the death of the deceased) occurred in Rock Creek Park, just a few minutes away from the deceased's home (T. 16-17; J.A. 9-10); that the witness was a close friend of the deceased whom he had known for about ten years (T. 20-21; J.A. 10-11).

SANDRA R. JOHNSON (claimant-widow): That at the time of his death the deceased was in the "employ" (as her counsel put it) of Jopra, Inc. which operates the Rotunda Restaurant (in the District of Columbia) (T. 25-26; J.A. 12); that the restaurant and corporate offices are in adjoining buildings, both of which the witness had frequently visited to dine and pick up her husband (T. 26-27; J.A. 12-13); that she had observed him performing "the normal duties [of] any *employer*", e.g., "instructing the bookkeeper as to setting up ledgers and ordering stationery"; that the deceased was Secretary of the Rotunda corporation and owned 50 percent of its stock (T. 27; J.A. 13-14); that the witness had also observed the deceased in that restaurant greeting people and setting up tables, especially if there were large parties; that when the Rotunda Restaurant closed at 2 or 3 a.m. he would check the cash register tape of receipts with the bartender against bills of waiters; that the witness regarded him as a "working partner" (T. 28; J.A. 14-15);[4] that the deceased maintained an office at home where he might conduct Jopra (Rotunda) business; that this corporation had furnished and maintained the car in which its deceased corporate officer was killed (T. 29-

[4] No testimony was offered to show that the deceased ever performed similar activities at Channel House (which was separately incorporated and controlled by another officer and in which the deceased also had a financial interest) either on the day of his death or at any prior time.

31; J.A. 16-17);[5] that the deceased used the car in various activities connected with Rotunda business and to drive to and from work (T. 30; J.A. 16-17); that the deceased "would go to the [Rotunda] Restaurant and perform what he called 'his daily rounds'. He talked to the chef, he talked to his partners; had lunch down at the restaurant" (T. 31-32; J.A. 18); that he would have business meetings with his partners (T. 32; J.A. 19); that the witness and the deceased had no car other than the one supplied by the corporation (T. 35; J.A. 20); that the deceased was also an officer in the corporation which owned the Channel House Restaurant and held a one-third interest in it (T. 36, 45; J.A. 20); that in addition he owned interests in a corporation operating the Linden Hill Restaurant in Maryland; that he also owned two incorporated drive-in theatres in Virginia operated by local managers (T. 36-37-38, 45; J.A. 22-23); that the *Jopra* (Rotunda) car was used for the deceased's Linden Hill business (which had no connection with Rotunda) (T. 40; J.A. 23); and if the deceased were going out to play golf "he would use the company car" as the only one available to him (T. 41; J.A. 24); that the deceased exercised his activities over the Rotunda from inside that restaurant, which business was his "primary interest" or "main business" (T. 42, 48; J.A. 24, 28); that there were six or seven employees in the office of Rotunda (T. 42-43; J.A. 24-25); that the deceased received no "salary" or "income" from Rotunda (T. 43; J.A. 24); that the deceased "owned a third interest in the Channel House [from which he had departed just prior to his death and which is not involved here as an employer with respect to any compensation claim], 50 per cent of The Rotunda, and 30 per cent of the Linden Hill" (T. 45; J.A. 26).

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[5] A car was similarly furnished officers who actively controlled the other corporations wherein they and the deceased were associated which was used not only for business but for personal purposes as well (T. 70-72).

ERMANNO PRATI: That he is Vice-President of Jopra, Inc. (T. 50; J.A. 29); that the witness, his brother Henry Prati, and the deceased comprised the Board of Directors of that corporation (T. 50, 53; J.A. 29-30); that on the day of the death of the deceased the witness met his brother and the deceased about noon at Aldo's Restaurant (in which the deceased had no interest), leaving there together about 2:00 p.m. for the Washington Golf and Country Club (T. 63-64; J.A. 30-31); that they played golf until about 6:30 or 7:00 p.m., had a drink, and returned to Aldo's for dinner (T. 64; J.A. 31); that *the dinner at Aldo's was strictly "social" in nature, concluding about midnight* (T. 64-65; J.A. 31); that Mr. Dobal joined their party after his dinner with his own group and, upon leaving Aldo's, went with the deceased to the Black Sheep because "they just wanted to go there" (T. 65; J.A. 31-32); that the witness later joined the two men at the Black Sheep and found them at the bar; that the witness left and thereafter was awakened (at home) about 3:00 a.m. by the Park Police who informed him of the accident in which the deceased was killed; that Jopra, Inc., operates the Rotunda Restaurant (T. 66; J.A. 32-33) in which corporation the deceased had a 50 percent interest; that the witness owned 25 percent, as did the witness' brother; that the business was run by all three owners to a certain extent, with the witness' brother, as president, calling most of the shots; that "we were all responsible for different things in the business that came up. Our abilities fell into different areas" (T. 67; J.A. 33-34); that while the witness and his brother were involved in the Prajo corporation, which is Channel House, and the Tijon corporation, which is Linden Hill, along with the deceased, only two, namely, the witness and his brother, were involved in Aldo's restaurant (T. 68; J.A. 34); that the witness had known the deceased for 10 or 12 years and they were close friends (T. 69; J.A. 34); that each of the three men operated cars which were titled in the respec-

tive names of one or the other of their jointly-owned corporations; that this arrangement provided better tax savings to the three; that the cars were provided the men in order to get to various places, and *were used by the men for both business and personal use* (T. 70-72; J.A. 35-37); that the witness considered the deceased to be "a partner of our *management* team"; that the Jopra profits were to be "split three ways" "regardless of the stock ownership"; that at the time in question, Jopra was "a relatively new corporation" which was "highly financed", and so, because of a $100,000 indebtedness, profits were not contemplated (T. 71; J.A. 36); that "the only thing I can say, we had been out, had a lovely day; we had played golf. We talked business *if* it came up. Naturally, it was a great motivator in our lives. It brought us together. We discussed business perhaps and perhaps not. We spent so many hours together every day, and I am sure business came up, whether we were playing golf or at the office . . . But the fact that we got together for dinner [on the eve before the death of the deceased] *was not a business meeting*" (T. 73-74; J.A. 37-38); that as Secretary-Treasurer of Jopra the deceased did more than just sign checks; that in addition to greeting "everybody that we knew", the deceased arranged parties for people since he had "a wide, varied acquaintance" (T. 74-75; J.A. 38); that the deceased's estate has no interest in Jopra, his stock interest having been sold and held in escrow (T. 75; J.A. 38-39); that the deceased had no interest in Aldo's (T. 77; J.A. 39); that the only restaurant that Jopra had was the Rotunda (T. 78; J.A. 39).

(c) *Discussion*

The deputy commissioner's task in the instant case was to decide from the evidence in the record, and the inferences to be drawn therefrom, whether the deceased's fatal injury occurred in the course of and arose out of employment for the claimed employer.

It was solely within his province, as trier of the facts, to determine the credibility of witnesses; he could believe any part or all of the evidence presented according to his judgment of its truthfulness and reliability. *Associated General Contractors* v. *Cardillo*, 70 App. D.C. 303, 106 F.2d 237 (1939); *Kwasizur* v. *Cardillo*, 175 F.2d 235 (3rd Cir., 1949), *cert. denied* 338 U.S. 880; *Gooding* v. *Willard*, 209 F.2d 913 (2nd Cir., 1954); *Wilson & Co.* v. *Locke*, 50 F.2d 81 (2nd Cir., 1931); *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403 (2nd Cir., 1961); *Hudnell* v. *O'Hearne*, 99 F.Supp. 954 (Md. 1951). In so doing, he could accept part of a particular witness' testimony, and reject the balance. *Banks* v. *Chicago Grain Trimmers Ass'n. Inc.*, —— U.S. ——, 88 S.Ct. 1140 (1968).

In rejecting the instant claim for benefits the deputy commissioner found "that the injury and death . . . did not arise out of and in the course of the employment". It is readily apparent from the analysis of the evidence that there was ample warrant for that finding not only on the basis that the deceased at the time of death was following a purely social pursuit but that, as an officer of the alleged corporate entity, he was not engaged in any "employee" activity subject to the benefits of the District of Columbia Compensation Act.

Contrary to the position of appellants that on the night he was killed the deceased was returning home from a business activity, or that the act of driving the car was itself part of some business activity, the record contains no reliable evidence to substantiate this contention. The unrefuted evidence of the deceased's friend, business associate and partner, Ermanno Prati, affirmatively showed that no business meeting was called and none held on the night in question. Certainly it is clear that there was no business conducted which related to the subject employer, Rotunda. What is clear, without contradiction, is that the deceased and his two business associates had played golf all afternoon, returned to Aldo's (a restaurant in which the deceased had no business interest) for dinner, and thereafter parted company for the night. The subse-

quent activities of the deceased are somewhat obscured. Testimony was received from Mr. Dobal that the deceased was allegedly seeking a Mr. English at the Black Sheep (another restaurant in which the deceased likewise had no business interest). However, Mr. English was not there, and the deceased was observed at the bar, apparently socializing. At the next stop, Channel House Restaurant, the deceased assertedly, by hearsay, intended to "check up" on things. However, there is not an iota of evidence to show what the deceased in fact did there or whether this asserted intention was fulfilled in any respect. Not a single business activity was shown there. Further, there was no evidence to connect anything done there with work for this employer, Rotunda. Additionally, there was not a shred of evidence there (or at any of the deceased's other stops) to indicate that whatever he did was done in any capacity as an "employee"—as distinct from the deceased's employer capacity as an officer who, as such, may not be subject to the protection awarded "employees."

The wife of the deceased testified that his main interest was in the Rotunda Restaurant. Although she went to great lengths to explain his activities there, he was never shown to have been present at that place on the day of death. She offered no explanation of any activities at Channel House, the last stop made by the deceased before going home. No doubt this absence of evidence was attributable to the fact that that restaurant was managed, as the record shows, by another corporate partner-officer of the deceased.

Obviously, under such circumstances it cannot reasonably be said that the activities of the deceased on the night of his death were associated with his business interests in general, nor with Rotunda in particular. On the contrary, the evidence specifically indicates that on the night in question the deceased's time was spent in strictly personal pursuits, from which he was returning when he was killed. But even if this evidence of personal pursuit could be disregarded, *arguendo*, and the widow's bare con-

clusions that the deceased had engaged in a business meeting were accepted, benefits still would not be payable on that basis alone in the light of all the other evidence of record.

As we have seen, the deceased was an officer of Rotunda, the corporate entity alleged to be the employer. Were it possible to assume, as the widow concluded, that claimant was engaged in some undisclosed business activity for Rotunda there was nothing to indicate that this was an activity as an employee, rather than as an officer of Rotunda. Instead, there was a complete absence of evidence to identify or show that what allegedly was done had any association with the particular employer here charged with liability. It was not even shown when the deceased had last been in the Rotunda. The deputy commissioner is asked to imply that the movements of the deceased on the night in question were not only related to the Rotunda but that these movements were of an "employee" nature. It has been held that compensation laws do not apply so as to cover an individual's executive functions. *Higgins* v. *Bates St. Shirt Co.*, 129 Me. 6, 149 A. 147 (1930); *Benson* v. *Hygienic Artificial Ice Co.*, 198 Minn. 250, 269 N.W. 460 (1936); *Ryan* v. *State Auto Parts Corp.*, 255 Ill. App. 422 (1930); *Hodges* v. *Home Mortgage Co.*, 201 N.C. 701, 161 S.E. 220 (1931); *Carville* v. *Bormot & Co.*, 288 Pa. 104, 135 A. 652 (1927); *Manfield and Fireman Co.* v. *Manfield*, 9 Ind. App. 70, 182 N.E. 539 (1932); *Korovilas* v. *Bon Ton Renovating Co.*, 219 Minn. 294, 17 N.W.2d 502 (1945); *Gassoway* v. *Gassoway & Owen*, 220 N.C. 694, 18 S.E.2d 120 (1942); *Wehr* v. *Philadelphia Derrick & Salvage Co.*, 192 Pa. Super. 161, 159 A.2d 924 (1960).

That whatever duties the deceased might have performed at times for Rotunda were of an executive character is shown by the fact that he and the other corporate officers and owners of the business were not paid salaries. Instead, they were paid according to profits derived. Obviously, this is not consistent with "employee" status. Thus, when an officer and stockholder is so completely in

control of a corporation that his remuneration is not paid as wages or salary but from earnings instead, his activities, whatever may be their nature, have not been regarded as having been performed in any capacity other than as entrepreneur. See *Alperni* v. *Eagle Indemnity Co.*, 169 Tenn. 215, 84 S.W. 2d 101 (1935); *Roack* v. *Roack Motor Co.*, 413 P.2d 1019 (Kan. 1966); *Lear* v. *Patricia Mining Co.*, 335 S.W.2d 559 (Ky. App. 1960).[6]

Disregarding the executive status of the deceased as an officer of the claimed employer, Rotunda, and overlooking the fact that the evidence failed to show that claimant had done anything for Rotunda, either as an officer or an employee, on the day in question, claimant seeks to establish liability by reason of the fact that the automobile, in which claimant was injured while returning home immediately following a long period of recreation consisting of golf, dining, and drinking, had been supplied the deceased as a corporate officer in the same way that similar vehicles had been furnished the other corporate officers with whom he was associated. While inferentially recognizing the principle of non-compensability for injuries sustained in going to and coming from work,[7] claimant seeks to erect her case on a premise which finds no support, factually or legally, in the record.

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[6] Nor does the fact that an insurance premium may have been charged by an insurer on the basis of an officer's executive functions authorize an award through application of any principle of estoppel, as claimant contended it did before the deputy commissioner (T. 59). *Soars* v. *Soars-Lovelace, Inc.*, 346 Mo. 710, 142 S.W. 2d 866 (1946). Even payment of compensation itself without the existence of any legal obligation therefor has been held not to create an estoppel barring the employer and its insurer from later successfully establishing that the law did not require such payment *Ocean Accident & Guarantee Corp.* v. *Lawson*, 135 F.2d 865 (5th Cir., 1943); *Oljenik* v. *O'Hearne*, 135 F.Supp. 496, 497-498 (Md. 1955); *Nacerima Operating Co.* v. *O'Hearne*, 217 F.Supp. 332 (Md. 1963).

[7] *Foster* v. *Massey*, D.C. Cir., No. 21,480, decided May 29, 1968; citing *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947); *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162 (1933); *Morgan* v. *Hoage*, 63 App. D.C. 355, 72 F.2d 727, *cert. denied*, 293 U.S. 606 (1934); *New Amsterdam Casualty Co.* v. *Hoage*, 60 App. D.C. 40, 46 F.2d 837 (1931); *Clark* v. *Commercial Casualty Co.*, 95 F.2d 58 (5th Cir., 1938).

In the first place, the record shows that the car was the only one the deceased had. And, most important, it was undisputed that the car could be and was in fact used by the deceased for purely personal purposes unrelated to the business, in the same manner as the other corporate officers used theirs. It is irrelevant to the discussion of this case that the car allegedly might have been supplied for some business purpose, whether of a general or emergency nature. At the time of the injury in question it was not involved in any such purpose, any more than if the deceased had been returning from a theatre that night. In an effort to establish here an exception to the going and coming rule, claimant places reliance on those cases which have observed that if an employer furnishes transportation, liability for compensation may then exist. However, as shown by the quotation from *Cardillo* v. *Liberty Mut. Ins. Co.*, *supra*, note 7, 330 U.S. 469 (1947), found in claimant's brief, the going or coming must be to or from one's *employment.* Recognizing this defect in her case, claimant seeks to defeat its effect by reliance on cases wherein activities in connection with recreation after working hours have been held compensable.[8] But the attempt is fallacious for the obvious reason that each case involved an employment far removed from one's home area so that the normal pursuits of home life were absent. Under such working conditions—circumstances not present here with reference to the deceased's work in the District of Columbia area where he was domiciled—the general rule, and not the exception, applies with respect to the injured person's travel to and from his home, whether for business or pleasure.

Finally, claimant's reliance upon the presumption of Section 20(a) of the Act[9] is without support here. As we have seen, there was indeed substantial evidence to show

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[8] See, for example, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965); *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *Self* v. *Hanson*, 305 F.2d 699 (9th Cir., 1962).

[9] 33 U.S.C. 920(a).

that claimant was returning home from a day of personal pleasure when he met his death. If there was any absence of evidence, it existed on the part of claimant who completely failed to establish any employee work activity performed by the deceased for Rotunda on the day in question. The presumption is not an instruction to courts that liability must be found in every case of some alleged employment relationship, without regard to the fact that the evidence of time, place and circumstances of the occurrence of injury. It is not a passport to recovery. When, as here, the record shows the injury had no factual or legal relationship to any employment, the presumption falls out of the case. *Del Vecchio* v. *Bowers*, 296 U.S. 280-287 (1935).

It should be remembered that in cases such as the present one judicial review of a deputy commissioner's rejection of a claim, based as it must be upon all the evidence of record, involves a somewhat different viewing of the evidence from a review of a deputy commissioner's award of compensation. In the latter case, there must be affirmative evidence in the record before the deputy commissioner to support the award; in the former, on the other hand, affirmative evidence is not needed since, upon failure of a claimant to carry the burden of proof in support of his claim, the deputy commissioner must reject the claim notwithstanding an absence of affirmative evidence to disprove or negate it. In other words, it is not necessary for the employer to prove a negative. *Gooding* v. *Williard*, 209 F.2d 913 (2nd Cir., 1954); *Kwasizur* v. *Cardillo*, 175 F.2d 235 (3rd Cir., 1949), *cert. denied* 338 U.S. 880. The rejection follows the claimant's failure to establish his claim.

The judicial function is not for the Court to decide the case for itself, as we have seen, *Hurley* v. *Lowe*, 83 U.S. App. D.C. 123, 168 F.2d 553 (1948), *cert. denied*, 334 U.S. 828; *Groom* v. *Cardillo*, 73 App. D.C. 358, 119 F.2d 697, 698 (1941); *Wolff* v. *Britton*, 328 F.2d 181 (1964); *J. V. Vozzolo, Inc.* v. *Britton*, 126 U.S. App. D.C. 259, 377 F.2d 144 (1967), but, rather, to determine whether there

is substantial evidence in the record that will support the decision reached by the deputy commissioner. Here there was sufficient legal basis, based upon the record evidence, to support the deputy commissioner's conclusion that death was not associated with any of the deceased's employment activities for the employer against whom claim was asserted. Certainly, it cannot be said that on the record as a whole the deputy commissioner was "compelled" to reach a conclusion contrary to the one he made, *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951), that his conclusion was "contrary to law", *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947), or that his holding was "irrational", *O'Keeffe* v. *Smith, Hinchman & Grylls*, 380 U.S. 359 (1965). Indeed, any other conclusion in view of the record would be completely without foundation, factually and legally.

CONCLUSION

In view of the above, it is the respectful submission of the appellee Deputy Commissioner that the compensation order complained of is in accordance with law, and that the judgment of the Court below sustaining it was proper and should be affirmed.

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 320963 225

REPLY BRIEF OF APPELLANTS

In the

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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on behalf of her minor child,
DARE ELIZABETH JOHNSON,

Appellants,

vs.

W. L. MASSEY, Deputy Commissioner,
United States Department of Labor
Bureau of Employees' Compensation,
District of Columbia Compensation District,

Appellee,

and

CONTINENTAL CASUALTY COMPANY,

Appellee.

Appeal From United States
District Court for the District
of Columbia

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I

THE DECISION OF THE DEPUTY COMMISSIONER IS NOT IN ACCORDANCE WITH LAW

The Appellee Deputy Commissioner's decision and brief disregards the presumption of compensability created by the Act, namely, that the law creates "an express statutory presumption that the 'claim comes within the provisions of this chapter,' a presumption of compensability grounded in the 'humanitarian nature' of the Act." Wheatley v. Adler (App. D.C.) (F.2d) decided en banc on May 17, 1968. The most recent decisions of the Supreme Court of the United States and this Court hold that the right of an employee or his widow and child to compensation does not turn on whether the cause of the death of the employee was "related to the deceased's employment." "All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose." O'Leary v. Brown-Pacific-Maxon, et al, 340 U.S. 504, 95 L.Ed. 483 (1950). One of the conditions of decedent's employment was the hazards of the use of his employer's car and he was killed while using the car on an authorized trip to his home.

The Deputy Commissioner's decision did not weigh the evidence under this test. It therefore is not in accordance with law. In this case the use of the employer's automobile, including the necessity that it be

available for emergency purposes, gave rise to a "zone of special danger" an occupational hazard, (JA 36, 37).

Each of the officers of the employer were given the use of an automobile, registered in the name of one of the three corporations in which they each owned stock. They were authorized and used the car for all purposes, (including the business of the Channel House, one of the restaurants owned by the three corporations.) The accident occurred while decedent was returning to his home from a visit to the Channel House where he had gone to "check on things."

On cross-examination, Mr. Dobal (JA 11), testified:

Q. What did you do in the Channel House?

A. He wanted to check on things, as he put it, and we went in there and he had his duties to do, whatever he was going to do; and I talked to a couple of people, and then the bar tender.

Q. And I take it he had some business at the Channel House, which he owned?

A. He so indicated.

Q. Now, after completing his business in the Channel House Restaurant, you left; and what time was that?

A. We were in there when it closed. It was after two.

Appellee's suggestion that the Deputy Commissioner could disregard this evidence as "hearsay" is untenable, for it is well settled that the Deputy Commissioner is not bound by the common law rules of evidence and hearsay evidence is generally admissible. Young and Co., et al v. Shea (CA 5) 397 F. 2d, 185 (1968).

It is respectfully submitted that the use by decedent of the employer's automobile to drive to his home was "within the scope" of the "employer's authorization" (JA 35, 36) and warranted an award of compensation because it related to the employer's property in the decedent's care. (Cf. Gondeck v. Pan American World Airways, 382 U.S. 25, 15 L.Ed. 2d, 21 (1965)), and under the doctrine of Self v. Hansen, 305 F. 2d 699 (9th Cir. 1962), because the employer would have been liable to third persons injured through decedent's negligent use of the automobile.

Self v. Hansen (supra) is cited on a "compare basis" in O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 13 L.Ed. 2d 895 (1965).

II

THE DECEDENT, ONE OF THREE OFFICERS AND DIRECTORS AND THE OWNER OF ONLY 50% of THE EMPLOYER'S STOCK, WAS NOT COMPLETELY IN CONTROL AND WAS COVERED BY THE ACT.

The Appellee suggests that the widow and child are not entitled to compensation on the erroneous premise that the decedent's duties were of an executive character, citing cases involving officers and stockholders

"completely in control of a corporation." This suggestion is untenable for several reasons!

(1) The decision of the Deputy Commissioner is not based on that premise. It found that the decedent "was in the employ of the employer above-named" (Appellee's Brief, p. 2).

(2) The decedent was not in complete control of the employer corporation. He owned only 50% of the stock, was one of three Directors and was subject to control of the Board of Directors and the President of the corporation (JA 35).

(3) The decedent duties for his employer were not exclusively executive in character (JA 14, 15). One of which was to drive and care for the automobile furnished him by his employer and which he was authorized to drive at the time and place he was killed. (JA 16). Cf. Cardillo v. Hartford Accident and Indemnity Co., 71 App. DC 330, 109 F. 2d, 674 (1940).

(4) The authorities do not support Appellee. In every State, except Maine, from which decisions are cited by appellee (Appellee Br., p. 14), the recent decisions hold that corporate executives are covered by the act.

In this regard, it should be noted that Appellee does not refer to Larsen's Workmen's Compensation Law, Sec. 54.21 (1967 printing) which states:

> "Under modern compensation law, the fact that a claimant is a corporate officer does not itself bar him from recovering Workmen's Compensation benefits, and the normal rule must now be taken as holding that corporate executives are covered by the Act."

It should be noted that Appellee does not refer to a brief filed by him in the Court below in Pollack v. Einbinder (CA 2962-61) decided in 1962, involving an owner of 100% of the stock of a corporation. The Deputy Commissioner there distinguished such cases as Cook v. Miller's Indemnity Underwriters, 240 SW 535 (Texas 1922), In Re Daynes, 66 Ind. App. 401,118 NE 387 (Ind. 1917), Zurich Accident and Liability Insurance Co. v. Ind. Com. 193 Wis. 32, 213 NW 630 (Wis. 1927), which allowed compensation to executive stockholders on the ground that those cases involved executives who were not sole stockholders.

It would be a miscarriage of justice to deny the widow and child compensation, while permitting insurance companies to collect premiums on the salary of executives without giving them the benefit of the law.

CONCLUSION

In conclusion, it is respectfully submitted that the entire record reviewed under authority of Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951) establishes that the decision of the Deputy Commissioner affirmed by the Court below is contrary to law, and is not supported by substantial evidence, and should be reversed.

Respectfully,

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